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In the Supreme Court of the United States

OCTOBER TERM, 1978

DOUGLAS OIL COMPANY OF CALIFORNIA AND PHILLIPS PETROLEUM COMPANY, PETITIONERS

v.

PETROL STOPS NORTHWEST, GAS-A-TRON OF ARIZONA, COINOCO AND UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (A. 1-8) is reported at 571 F.2d 1127. The order of the district court (A. 48-49) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1978. The petition for a writ of cer-

tiorari was filed on April 28, 1978, and granted on June 19, 1978. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion or applied an incorrect legal standard when, after the conclusion of all criminal proceedings, it authorized release to private plaintiffs in an antitrust action of grand jury materials already disclosed to the defendants, for the limited purposes of impeachment or refreshing recollection of witnesses.

2. Whether the district court in which a grand jury was impaneled was authorized to make a limited disclosure of grand jury materials for use in a private antitrust case pending in another district.

STATEMENT

In November and December 1973, Petrol Stops Northwest, Gas-A-Tron of Arizona and Coinoco (collectively "Petrol Stops") began two antitrust actions in the United States District Court for the District of Arizona. Petrol Stops claimed that Douglas Oil Company of California ("Douglas"), Phillips Petroleum Company ("Phillips"), and other gasoline refiners and distributors had conspired to fix prices and restrict access to gasoline in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2. *Petrol Stops Northwest* v. *Continental Oil Co.*, Civ. No. 73-212 Tuc-JAW (D. Ariz., filed Dec. 13, 1973); *Gas-A-Tron of Arizona* v. *Union Oil Co.*, Civ. No. 73-191 Tuc-WCF (D. Ariz., filed Nov. 2, 1973) (A. 129-167).

In the meantime, a grand jury in the Central District of California was investigating possible gasoline price fixing by Douglas, Phillips and others. In the course of its investigation, it called certain employees of Douglas and Phillips as witnesses. It also subpoenaed documents from the corporations.

The grand jury in March 1975 indicted Douglas, Phillips and four other corporations for fixing the price of rebrand gasoline.[1] *United States* v. *Phillips Petroleum Co.*, No. 75-377-MML (C.D. Cal., filed Mar. 19, 1975) (A. 118-123). The defendants initially pleaded not guilty. In the course of preparation for trial, Phillips and Douglas demanded and obtained from the prosecutors copies of the grand jury testimony of their employees. See Fed. R. Crim. P. 16(a)(1)(A). In December 1975, however, these defendants changed their pleas from not guilty to nolo contendere.[2] The court accepted the nolo pleas, fined each defendant the maximum $50,000, and the criminal action ended (A. 1).

In December 1976 Petrol Stops applied to the United States District Court for the Central District of California to obtain, for use in its Arizona anti-

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[1] "Rebrand gasoline" was defined in the indictment as gasoline sold for resale in service stations under a trademark or brand name not owned or controlled by an oil refiner (A. 118).

[2] All the defendants except Douglas and Phillips had changed their please to nolo contendere on June 5, 1975, and were sentenced to fines of $50,000 each.

trust action, the portions of the grand jury transcript that had been made available to Phillips and Douglas during the criminal proceedings (A. 114-117). Also requested were all documents that Phillips and Douglas had produced in response to grand jury subpoenas (A. 115). The government, custodian of the material, did not object to the disclosure sought by Petrol Stops (A. 99-100).

After holding a hearing (A. 50-64), the district court authorized Petrol Stops to inspect and copy the requested grand jury testimony and the documents produced by Phillips and Douglas (A. 48-49). It limited disclosure to counsel for Petrol Stops in the pending Arizona antitrust cases (A. 49) and further limited the use of the grand jury material "solely for the purpose of impeaching that witness or refreshing the recollection of a witness, either in deposition or at trial" (A. 49).

The court of appeals unanimously affirmed (A. 1-8). It found that the indictment charged antitrust violations similar to those alleged in the private actions (A. 1-2), and it held that the district court's "carefully limited disclosure" comported with prevailing case law and was not an abuse of discretion (A. 8).[3]

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[3] A question arises whether the case was properly before the court of appeals since the appellants (the present petitioners) were neither formal parties in the district court nor the addressees of the order issued by that court. See *Ex parte Leaf Tobacco Board of Trade*, 222 U.S. 578, 581 (1911). The court of appeals resolved the question in favor of jurisdiction (A. 2-4). In our view, that conclusion was justified on either of two grounds. First, it may be that the disclosure hearing, notwithstanding the new caption (see A. 48, 52, 114), should be deemed an ancillary proceeding in the criminal case, in which petitioners were of course full parties. Alternatively, if the petition for production initiated a wholly separate case, it would seem that the present petitioners effectively intervened in the district court and were treated as parties in that court. See A. 90-98; 52-64; 48.

SUMMARY OF ARGUMENT

I

The lower courts correctly applied established standards in ordering disclosure of grand jury testimony. The applicants, plaintiffs in private antitrust litigation, described the requested grand jury materials with specificity. They did not seek wholesale disclosure of the transcript, but, rather, sought only the testimony of the defendants' employees before the grand jury. And they showed a particularized need for disclosure to impeach or refresh recollection by pointing to possible conflicts between the petitioners' answers to interrogatories in the civil suit and their plea of nolo contendere to the indictment, and also between statements of the defendants' employees in depositions and statements in the government's bill of particulars.

On the other hand, the need for continued grand jury secrecy was severely attenuated. When, as here, the criminal proceedings have terminated, the primary concern is to protect witnesses from retaliation. But that consideration is diminished when the portions of the grand jury transcript sought have already been

disclosed to the witnesses' employers. Because the employer has the greatest incentive to retaliate and it is common practice in criminal actions for multiple defendants to exchange the testimony of their employees, the release of portions of the grand jury transcript does not seriously implicate any of the reasons for grand jury secrecy.

II

Contrary to petitioners' argument, there is no rule that the disclosure decision must always be made by the civil action court. On the contrary, ultimate authority to disclose grand jury material rests in the district in which the grand jury was convened. That court makes the disclosure decision or authorizes another court to make it. Whether referral to the civil court is appropriate will depend upon the particular circumstances: it is not required in every case.

Here the district court did not abuse its discretion in making the disclosure decision alone. The need for the materials was clear, the interest in maintaining secrecy was minimal, and the balance was easily struck. In this situation, it was entirely proper for the grand jury court to order disclosure without a wasteful reference to a second court.

ARGUMENT

I

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION AND CORRECTLY APPLIED THE APPLICABLE LEGAL STANDARD WHEN IT AUTHORIZED LIMITED DISCLOSURE OF GRAND JURY TRANSCRIPTS.

At the outset, we stress the narrow context of the present case. First, the procedural setting of the request for production of grand jury material is atypical. The disclosure sought did not implicate on-going grand jury or criminal proceedings. They had ended a year before the filing of the request. Here the applicants are private antitrust plaintiffs, not defendants in a criminal case. Compare *Dennis* v. *United States*, 384 U.S. 855 (1966). Moreover, the material asked for—the testimony of the defendants' employees—had already been disclosed to the defendants. That disclosure was authorized by Fed. R. Crim. P. 16(a)(1)(A). Thus, the question is not whether grand jury secrecy should be breached, but, rather, whether materials already divulged outside the government should be made available to both sides in private litigation. Finally, there is at least a potential contradiction between the plea of nolo contendere entered by the defendants in the criminal proceedings and their denial of actionable antitrust violations in defending the civil action.

Such is the setting in which the issue arises. But it is also relevant to note the limited character of the order actually entered. It did not condone a

"wholesale" turn-over of the grand jury transcript: less than one-fifth of the material was ordered produced. Compare *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 683 (1958). What is more, disclosure was restricted to plaintiffs' counsel, and use of the materials was expressly limited to impeaching witnesses or refreshing their recollection (A. 49).

In these special circumstances, we believe the district court was fully authorized to enter the challenged order.

1. It is of course well settled that the secrecy of grand jury proceedings must give way when justice requires it. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940). Rule 6(e) of the Federal Rules of Criminal Procedure recognizes this principle by providing that disclosure of grand jury materials may be made "when so directed by the court preliminary to or in connection with a judicial proceeding." Rule 6(e)(2)(C)(i).[4] See *Pittsburgh Plate Glass Co.*

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[4] Although nothing turns on it, petitioners assert (Pet. Br. 3 & n.1) that we should look only to Rule 6(e) as it read when the district court made its decision, disregarding the 1977 formulation that did not become effective until the case was pending before the court of appeals. We submit that the 1977 amended rule is applicable to this case on appeal. Courts ordinarily apply the law in effect at the time of decision, even if the law changes during appellate proceedings. *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974). The Federal Rules of Criminal Procedure apply to criminal proceedings in the appellate courts, *Harrison* v. *United States*, 191 F.2d 874, 875 (5th Cir. 1951), and it has usually been found "just and practicable" to apply the rules and amended rules to pending cases when they became effective. Fed. R. Crim. P. 59; *United States* v. *Sheridan*, 329 U.S. 379, 393 (1946) (newly enacted rules applied to case on remand). Application of the newly amended rule would create no injustice for, as petitioners agree (Pet. Br. 3 n.1), the meaning of the relevant part of the rule was not changed. 123 Cong. Rec. H7865 (daily ed. July 27, 1977) (remarks of Rep. Mann); S. Rep. No. 95-354, 95th Cong., 2d Sess. 6-8 (1977).

v. *United States*, 360 U.S. 395, 398-399 (1959). But the Rule does not tell us when such an order should be entered. To find the governing standard, we must turn to judicial precedent.

The landmark decision is the *Procter & Gamble* case in this Court, *supra*. There a grand jury investigation of possible antitrust violations did not lead to an indictment. After the grand jury was discharged, the United States filed a civil antitrust suit against the targets of the investigation and used the grand jury materials in preparing its civil case. Invoking Fed. R. Civ. P. 34, the defendants sought the entire grand jury transcript, which the district court ordered produced. This Court reversed. Stressing the policy of grand jury secrecy, the Court ruled that the need for disclosure must be shown with "particularity." 356 U.S. at 681-682. Also acknowledged, however, was the countervailing policy in favor of disclosure based on the fundamental concept that litigation should be "a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *Id.* at 682. The Court explained that resolution of these opposing interests required a case by case balancing of the need for disclosure against the need for continued grand jury secrecy.

In *Procter & Gamble* the proponents of disclosure failed to make the requisite showing because they sought "wholesale" disclosure of the entire jury proceedings. *Id.* at 683. But the Court indicated that a different situation would be presented where the grand jury transcript was used "to impeach a witness, to refresh his recollection, to test his credibility and the like * * * [for] those are cases of particularized need where the secrecy of the proceedings is lifted discretely and limitedly." *Ibid.*

Later cases have employed this analysis, first requiring a particularized demonstration of need, and then balancing that showing against the interest in continued grand jury secrecy. *Dennis* v. *United States*, *supra*, 384 U.S. at 872 & n.18; *Illinois* v. *Sarbaugh*, 552 F.2d 768, 774 (7th Cir.), cert. denied, 434 U.S. 889 (1977); *U.S. Industries, Inc.* v. *United States District Court*, 345 F.2d 18, 21 (9th Cir.), cert. denied, 382 U.S. 814 (1965); *Allis-Chalmers Manufacturing Co.* v. *City of Fort Pierce*, 323 F.2d 233, 238 (5th Cir. 1963); see also *Pittsburgh Plate Glass Co.* v. *United States*, *supra*, 360 U.S. at 403 (Brennan, J., dissenting).[8]

2. The courts below, we submit, correctly applied these principles. The material requested was required to be described with particularity (A. 4, 53). The plaintiffs—instead of asking for a wholesale turnover

[8] Although the particularized need standard of *Procter & Gamble* concerned a motion for disclosure under Fed. R. Civ. P. 34, that standard has been applied in Fed. R. Crim. P. 6(e) cases. See, *e.g.*, *Illinois* v. *Sarbaugh*, *supra*.

of the entire grand jury transcript—specified only the testimony of the defendants' employees (A. 115-116). Next, the plaintiffs had to show a particularized need for this material, and this they did. They explained that they intended to use the material for the accepted and traditional purposes of impeachment and testing credibility, and, in the words of the court of appeals, plaintiffs showed "a particularized need beyond the mere relevance of the materials," pointing to apparent conflicts between the defendants' answers to interrogatories in the civil suit and their plea of nolo contendere to the indictment, and also between statements of the defendants' employees in depositions and statements in the bill of particulars (A. 7). Finally, the courts below undertook the traditional balancing task. Taking into account the fact that the material sought had long since been released to the defendants, the courts concluded that the plaintiffs' need outweighed any remaining interest in nondisclosure (A. 5-6, 7-8, 54).

Petitioners invite this Court to reweigh the evidence twice considered by the lower courts to reach the opposite result (Pet. Br. 22-25). That is a task the Court generally declines. *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *FTC* v. *Standard Oil Co.*, 355 U.S. 396, 400 (1958); *Lawson* v. *United States Mining Co.*, 207 U.S. 1, 12 (1907). But, even if undertaken, it would not avail petitioners.

3. In effect, petitioners complain that the district court was over-generous in releasing too much material, too soon, and on an insufficient showing of need,

or indeed relevancy. Much is made of the district judge's remarks at the hearing, which can be read to place the burden on those resisting disclosure (A. 55, 57; Pet. Br. 22). But, we suggest, the correctness of the ultimate ruling must be determined by taking into account all the circumstances actually before the district court, including the written submissions (see A. 67-117), and not only the somewhat unguarded verbal exchange invoked by petitioners. That was the approach followed by the court of appeals and is, we believe, the only fair way of testing the order. The judgment of the court of appeals—not the oral remarks of a district judge—is the subject of review here.

a. The question of relevance is hardly debatable. As the court of appeals wrote (A. 2), "[t]he indictment charged antitrust conduct similar to that alleged in the damage action." Specifically, the indictment accused the two petitioners, among others, of conspiring to fix artificially high the price of "rebrand" gasoline in several Western states, including California, Oregon, Washington and Arizona (A. 118, 119, 121). One of the civil complaints alleges the identical conspiracy against petitioners in the first three of those states (A. 130, 138), and the other complaint charges Phillips with like conduct in Arizona (A. 149, 158).[6] To be sure, different co-

[6] The suggestion that the civil complaints refer to different conduct because they do not use the expression "rebrand gasoline" is frivolous. That term is defined in the indictment as gasoline sold by refiners for resale under a trademark other than their own (A. 118). Typically, of course, such transactions are with independent marketers (see A. 120) and it is in that way that the gasoline involved is described in the complaints (A. 141, 160).

conspirators are named, and the civil complaints include a number of other allegations not made in the indictment. But there is a sufficient overlap to make highly relevant in the civil proceedings any admission of price-fixing which petitioners' employees may have made to the grand jury.

b. Nor does the matter rest there. Petitioners had entered pleas of nolo contendere to the indictment, which only charged the conspiracy to fix at artificially high levels the price of "rebrand" gasoline. This was in effect an admission of the charge. *Lott* v. *United States*, 367 U.S. 421, 426 (1961). And yet, in answers to interrogatories filed in the civil cases, petitioners appeared to be denying such conduct (see A. 83-86, 103-104). There was thus at least a potential inconsistency that justified comparing what petitioners' employees had told the grand jury.[7]

[7] This showing may be contrasted with that made in *Texas* v. *United States Steel Corp.*, 546 F.2d 626 (5th Cir.), cert. denied, 434 U.S. 889 (1977). The court of appeals there rejected the argument that disclosure during the criminal proceedings to a corporate defendant of its employee's testimony was itself sufficient to show particularized need warranting further disclosure in a civil suit. That argument, and the propriety of the holding in *Texas*, are not presented here.

In addition, Petrol Stops submitted deposition testimony by petitioners' employees which demonstrated inconsistencies with the government's bill of particulars in the criminal action (A. 22-47). The court of appeals found this to constitute a "stronger showing" of particularized need (A. 7).

c. The circumstances just recited, we believe, justify both the extent and the timing of the release of the relevant material. Because of the restricted allegations of the indictment, it must be supposed that all the testimony of petitioners' employees before the grand jury was relevant to the issue now before the civil court. This is not, of course, the "wholesale" turnover of the transcript condemned in *Procter & Gamble, supra;* as we have said, less than one-fifth of the total was released. And there is no inflexible rule against releasing all of a particular witness' testimony. *E.g., Dennis* v. *United States, supra.*

Nor does the decision in *Procter & Gamble,* or any other case, suggest that disclosure must always await the trial testimony of the witness whose grand jury statements are sought. Here petitioners' answers to interrogatories created an appearance of conflict that was ripe for testing before trial. In this situation, we believe present release of the potentially conflicting evidence was wholly appropriate.

d. Finally, petitioners complain that the district court "erroneously held that no need for grand jury secrecy existed in this case" (Pet. Br. 26). Although this somewhat overstates the matter, the district court did follow Ninth Circuit precedent, which holds that once criminal proceedings are over, the release of part of a grand jury transcript which has already been released to the witness' employer does not seriously implicate any of the reasons for grand jury secrecy (A. 54-55; 5). At least as applied here, we submit that approach is correct.

This Court has approved a formulation that articulates five reasons for grand jury secrecy:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

Procter & Gamble, supra, 356 U.S. at 681 n.6, quoting from *United States* v. *Rose,* 215 F.2d 617, 628-629 (3d Cir. 1954). Three of these reasons (1, 2, and 3) are not applicable after the criminal proceeding has terminated with a nolo plea. The primary consideration that remains after discharge of the grand jury is to protect witnesses from retaliation so that witnesses before future grand juries will testify freely. *Illinois* v. *Sarbaugh, supra;* see also *Pittsburgh Plate Glass Co.* v. *United States, supra,* 360 U.S. at 405-407 (Brennan, J., dissenting). There is a secondary interest in protecting innocent persons who may have been under investigation. The former interest is at stake in every case; the latter only when the grand jury materials would implicate such persons.

In light of Fed. R. Crim. P. 16(a)(1)(A),[8] an employee who testifies before a grand jury should assume that his employer may well, if indicted, obtain a transcript of his testimony. Moreover, in cases with multiple defendants, it is common for defendants to exchange transcripts among each other. See *Illinois* v. *Sarbaugh*, *supra*, 552 F.2d at 775. In these situations, since the parties with the greatest incentive and power to retaliate against the witness are likely to have access to his testimony, any additional disclosure is not likely to increase the risk a prospective witness would face in testifying. In the present case, where Douglas and Phillips obtained copies of all of their employees' grand jury testimony,[9] there is no appreciable chance that future testimony in other cases would be discouraged by disclosure to Petrol Stops' counsel under a protective order.

Petitioners nonetheless argue that the danger of retaliation by others in the industry is so great that

[8] Rule 16(a)(1)(A) provides in part:

> Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

[9] They also obtained some of the testimony of the employees of their co-defendants.

disclosure to plaintiffs was erroneous (Pet. Br. 27). The assumption which underlies this argument is that a witness who will testify fully, knowing that his testimony will be made available to his employer, and most likely to his employer's co-defendants, will abandon his candor out of fear that the testimony might also be made available to others in the industry (Pet. Br. 12). Petitioners provide neither precedent nor empirical support for their assertion. Nor is it a proposition which is intuitively obvious. Quite to the contrary, common sense supports the position taken by all the courts which have considered the matter: that the additional putative harm which others in the industry might do is not of such significance as to weigh heavily against disclosure.

Moreover, any existing concern can be alleviated by the use of a protective order, as was done here. See *Illinois* v. *Sarbaugh*, *supra*. The district court did not unconditionally release the testimony. Rather, it imposed stringent protective conditions: only counsel for plaintiff may use the material, and "solely for the purpose of impeaching that witness or refreshing the recollection of a witness, either in deposition or at trial" (A. 49). It is thus entirely possible that the grand jury testimony will never be made public at all.[10]

The suggestion that the district court neglected the grand jury's role in protecting the "innocent accused"

[10] Provided that the witnesses tell the same story now which they told the grand jury, plaintiffs will have no occasion to use the material.

(Pet. Br. 27, 14) is unpersuasive in the present context. The true innocent accused are a legitimate object of concern, but there is no reason to fear for them here. First, to the extent that any innocent accused may be mentioned in the transcript,[11] their identity has already been disclosed to the defendants. Second, the risk of more general disclosure is minimal. The requirement of relevance means that those who had nothing to do with the defendants' conspiracy are irrelevant to this case. Moreover, the material is subject to a protective order which prohibits its use except for impeachment and refreshing of recollection.[12]

The district court and court of appeals both concluded that the need for disclosure outweighed the remaining need for grand jury secrecy (A. 53-55; 7-8). In our submission, petitioners have failed to demonstrate that this conclusion was erroneous.[13]

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[11] Although petitioners have had access to the material, they do not argue that the names of previously-unrevealed subjects of investigation are in fact contained in the materials. They raise this point entirely as a hypothetical objection to releases of grand jury materials in general.

[12] The additional claim that disclosure would restrict the activities of future grand jurors by identifying them (Pet. Br. 14) is frivolous. Grand jury transcripts generally do not indicate the name of the grand juror making a statement or asking a question. Moreover, even if they did, petitioners would hardly have standing to complain, since they were the first to obtain copies of the testimony and obviously, as convicted criminals, have the greatest incentive to retaliate against the grand jurors who indicted them.

[13] The district court order also authorized disclosure of documents produced by Douglas and Phillips in response to grand jury subpoenas (A. 48). Although petitioners suggested in their petition that they challenged this ruling, they have apparently abandoned the claim, for their merits brief refers solely to the disclosure of transcripts of grand jury testimony.

We agree with the court of appeals that there was no error here. Documents subpoenaed by a grand jury, unlike the testimony, antedate the grand jury and are not its product. Because of this difference, it has been held that if documents are sought for their own intrinsic value, and not for the purpose of determining what transpired before the grand jury, the documents should be disclosed. *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960); *United States* v. *Cianfrani*, 448 F. Supp. 1102, 1105 (E.D. Pa. 1978). Here plaintiffs seek the documents not to discover the course of grand jury proceedings, but to use the documents independently to test the veracity and credibility of answers to interrogatories and depositions by Douglas and Phillips. Since petitioners do not contest the disclosure of the documents, the Court need not reach the question whether Rule 6(e) applies to documents subpoenaed for use by a grand jury. See *United States* v. *Weinstein*, 511 F.2d 622, 627 n.5 (2d Cir.), cert. denied, 422 U.S. 1042 (1975); *United States* v. *Interstate Dress Carriers, Inc., supra*; 1 Wright, *Federal Practice and Procedure* § 106 at 172 n.97 (1969).

II

THE DISTRICT COURT IN WHICH THE GRAND JURY WAS CONVENED PROPERLY EXERCISED ITS JURISDICTION TO DISCLOSE GRAND JURY TRANSCRIPTS.

Petitioners argue (Pet. Br. 28-44) that where the grand jury and civil actions proceed in different districts, the disclosure decision must always be made by the civil action court, and that in any event the grand jury court in this case abused its discretion by refusing to transfer the Rule 6(e) proceedings to

the civil action court. We submit that both contentions are erroneous.

1. Although Fed. R. Crim. P. 6(e)(2)(C)(i) provides for disclosure of grand jury materials "when so directed by a court * * *," it does not specify the relevant court. All precedent, however, indicates that ultimate authority to disclose grand jury materials rests in the district in which the grand jury was convened. *Illinois* v. *Sarbaugh*, *supra*, 552 F.2d at 772-773; *Gibson* v. *United States*, 403 F.2d 166, 167 (D.C. Cir. 1968); *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 21 F.R.D. 233 (D.D.C. 1957).

The grand jury court is normally the starting point for such proceedings. It makes the disclosure decision or authorizes another court to make it. *In re 1975-2 Grand Jury Investigation of Associated Milk Producers, Inc.*, 566 F.2d 1293 (5th Cir.), cert. denied, No. 77-1531 (June 19, 1978); *Illinois* v. *Sarbaugh*, *supra*; *Baker* v. *United States Steel Corp.*, *supra*, 492 F.2d 1074, 1075-1076 (2d Cir. 1974); *Gibson* v. *United States*, *supra*; *Atlantic City Electric Co.* v. *A. B. Chance Co.*, 313 F.2d 431, 433 (2d Cir. 1963); *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F. Supp. 486, 491 (E.D. Pa. 1962). Disclosure can be sought directly from the court in which the grand jury was convened (see, *e.g.*, *Illinois* v. *Sarbaugh*, *supra*; *City of Philadelphia* v. *Westinghouse Electric Corp.*, *supra*), or the initial application to the grand jury court may seek only to have that court transfer the materials and vest the civil action court with authority to order disclosure. See, *e.g.*,

In re 1975-2 Grand Jury Investigation of Associated Milk Producers, Inc., *supra*. Alternatively, the civil action court may be asked to certify to the grand jury court that disclosure is warranted. *Gibson* v. *United States*, *supra*; *Baker* v. *United States Steel Corp.*, *supra*, 492 F.2d at 1076. But, in that event, the final decision rests with the grand jury court.

The upshot is that the approval of the court in whose district the grand jury sits is always necessary before its proceedings are disclosed. This is more than a technical jurisdictional requirement. It reflects the reality that the grand jury court is uniquely aware of the considerations, sometimes peculiar to the case or to the locality, that may weigh in favor of continued secrecy. No doubt, it will often also be useful to have the civil action court appraise the need for the materials in the proceedings pending there. But, in many cases, that need can easily be assessed by the grand jury court and it is unnecessary to consult formally the court of trial. In our submission, it can never be wrong to apply first to the grand jury court for disclosure of grand jury proceedings, and only in egregious instances should that court's decision be upset for failure to defer to the court of trial.

2. In the context of this case, petitioners' claim that the district court abused its discretion by deciding the issue of disclosure is unpersuasive. Given that the grand jury court had ultimate jurisdiction over the materials, the only question is whether it was required to defer to the civil trial court for a determination of need. No doubt, it could have done

so. But, it need hardly be said, choosing an alternative course is not automatically an abuse of discretion.

As we have stated, there is no general rule that the civil court must participate in every disclosure decision. Judicial time is too precious to require two hearings in every such case. Here, the basis of the plaintiffs' claim for the materials was clear enough. And, on the other hand, the considerations normally arguing against disclosure were attenuated. In these circumstances, the balance was not difficult to strike and the grand jury court could properly make the decision alone. There was no abuse of discretion.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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